In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 542

PHILIP WILLIAM MCKINNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After having waived a jury trial, petitioner was convicted after a trial to the court in the United States District Court for the Eastern District of Kentucky of having knowingly refused to submit to induction in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment. The court of appeals affirmed the conviction but found the sentence excessive and remanded for resentencing (Pet. 20-31).

1. A full statement of the relevant facts is contained in the opinion of the court below. In summary, these facts show that in June 1967, after petitioner had reported for induction, he underwent a security clearance interview at the Induction Center; it was at this interview that petitioner first made known the fact that he considered himself a conscientious objector.[1] For reasons having nothing to do with this claim, his induction was held in abeyance by the Army pending its completion of the security investigation. During this nine-month period, petitioner did not raise any conscientious objection claim with his local board. In March 1968, the military completed its security investigation and advised the local board that petitioner was "fully acceptable" for service. Petitioner was thereafter sent a current information questionnaire by his local board—but still made no claim to conscientious objector status. He was ordered for induction on May 17, 1968. He refused to submit to induction on the grounds of conscientious objection.

2. Petitioner's various claims are fully answered in the detailed opinion of the court below, upon which we rely. We add our agreement with the view of the court (Pet. 27-28) that there is no reason to defer

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[1] His claim in this respect took place just prior to the close of the interview (Pet. 22):

> Q. Are you willing to serve in the Armed Forces of the United States? A. At the present time I would not be adverse to serving in a non-combat position in the military.
>
> Q. Do you consider yourself a conscientious objector? A. At the present time, yes.

disposition of the instant petition pending the outcome of *Ehlert* v. *United States*, No. 120, this Term, certiorari granted, 397 U.S. 1074. There is here no question of "crystallization"; indeed for nine months after first indicating conscientious objection views to the Army in his security interview petitioner did not pursue the matter and made no claim to his local board. Cf. *McKart* v. *United States*, 395 U.S. 185, 198 n. 16. Accordingly, this case is not comparable to *United States* v. *Holmes*, pending on the government's petition for a writ of certiorari, No. 111, this Term. There the issue of conscientious objection arises in the context of an oral claim made for the first time at the point of actual induction, at the induction station where, according to Holmes, his views first "crystallized". Here, on the other hand, the views allegedly crystallized nine months earlier, but petitioner did nothing about it in the interim. For similar reasons, *United States* v. *Stafford*, 389 F. 2d 215 (C.A. 2) (involving a written claim first made at the induction station) is also inapposite. Under the circumstances, the local board had no obligation to reopen petitioner's classification *sua sponte* during the nine-month hiatus, after the board ordered him to report, occasioned by the security investigation conducted by the military. See *United States* v. *Sandbank*, 403 F. 2d 38 (C.A. 2) certiorari denied, 394 U.S. 961.[2]

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[2] Petitioner's contention that he was denied procedural fairness (Pet. 13-14) because he was not required to re-execute a security questionnaire is insubstantial. This is a matter wholly for the benefit of the Army and may be waived. See, *e.g.*, *Nickerson* v. *United States*, 391 F. 2d 760, 762-

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1970.

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763 (C.A. 10), certiorari denied, 392 U.S. 907. Moreover, petitioner had already received a security clearance and he points to no information which would have changed that conclusion. *Oshatz* v. *United States*, 404 F. 2d 9, 12 (C.A. 9), is distinguishable since the registrant was never afforded the opportunity of filling out the required questionnaire.

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